United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2447

To be argued by
T. BARRY KINGHAM

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2447

UNITED STATES OF AMERICA,

Appellee,

—v.—

CATHERINE BRIGHT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Catherine Bright appeals from a judgment of conviction entered on November 6, 1974 in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Constance Baker Motley, United States District Judge, and a jury.

Indictment 74 Cr. 247, filed on March 14, 1974, charged the defendant with twelve counts of possession of stolen mail in violation of Title 18, United States Code, Section 1708. Prior to trial the District Court granted the Government's motion to dismiss Counts One, Eight and Nine.

Trial began on October 2, 1974 and concluded on October 4, 1974 when the jury found the defendant guilty of Counts Six, Seven and Twelve, and not guilty of Counts Two, Three, Ten and Eleven. When the jury reported a

deadlock as to the remaining counts, Counts Three and Four were dismissed on the Government's motion. (Tr. 287)*

On November 6, 1974, Judge Motley sentenced Bright to six months imprisonment, execution suspended, and six months probation.

Statement of Facts

The undisputed facts are that Bright possessed nine New York City welfare checks on various dates during 1972, and that those checks had been stolen from the mail. The Government presented a stipulation that the checks had been mailed and the testimony of the payees that they had not been received (Tr. 37-57). In addition, an auditor from the United Mutual Savings Bank testified that the checks had been cashed or deposited into two accounts, in the names Catherine Bright and Catherine Haynes, and that the checks had been tendered at different branches of the bank throughout Manhattan and the Bronx (Tr. 57-79). An expert document examiner testified that the defendant had written the second endorsements on all of the checks, in the names of Bright and Haynes. (Tr. 80-98).

Catherine Bright testified that she had indeed possessed the checks in question, and that she had cashed or deposited them at her bank, where she maintained accounts in her maiden and married names. (Tr. 104). She claimed, however, that she had not known that the checks were stolen, but that she had cashed them for a self-professed "hustler" named Freddie Scott (Tr. 130, 169). Bright claimed that Scott had told her that he had received the checks for rent from an apartment he had sublet from a friend, or in payment of a debt. (Tr. 123, 128, 130). After one of the

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* A redacted indictment was used to submit the case to the jury. The count numbers reflected herein are those in the original indictment.

checks was returned to the bank unpaid and debited against her account, she confronted Scott, who explained that there must have been a mixup. (Tr. 130, 133). Thereafter she cashed three more checks for him, those which were the subjects of Counts Six, Seven and Twelve, on which the defendant was convicted. (Tr. 133, 134).

Thus, the defense claimed at trial that Catherine Bright believed what Scott had told her and did not know the checks were stolen. The Government argued successfully that under the circumstances she must have known that the checks were stolen, particularly those cashed after one check had been returned unpaid.

ARGUMENT

POINT I

The District Court Properly Rejected the Defendant's Offer of Expert Psychiatric Testimony.

Although eschewing the defense of lack of mental responsibility under *United States* v. *Freeman,* 357 F.2d 606 (2d Cir. 1966), Bright sought at trial to introduce expert psychiatric testimony that she was incapable of knowing that the checks she had possessed were stolen because she had a "passive-dependent personality." The District Court granted the Government's motion to exclude the proferred testimony:

> ". . . I think the issue is settled in U.S. v. Freeman in this Circuit, and there is no authority which you have cited from this Circuit which permits psychiatric testimony on the issue of willfulness short of a defense of insanity.
>
> "The testimony of the psychiatrist will be excluded." (Tr. 26).

Bright argues now that Judge Motley's ruling was incorrect and that evidence of a personality disorder is admissible as relevant to the issue of knowledge or specific intent where an insanity defense is not offered. We submit that this argument must be rejected and that the District Court's ruling was entirely correct.

Bright couches much of her argument on appeal in terms of an issue of "mental responsibility." (Brief at 21). However, defense counsel at trial carefully limited his offer of proof to the anticipated testimony of a Dr. Norman Weiss, a psychiatrist, who would have testified that:

> ". . . at the time of the alleged crime the defendant suffered an abnormal mental condition or mental disorder recognized by the American Psychiatric Association as a mental disorder, to wit, passive dependent personality, with aggressive features, and that this condition made her unable to know that the checks in question were stolen." (Tr. 26, 27).

The defense proffered two letters from Dr. Weiss in support of the offer of proof, which were, if anything, even less expansive. In the second, dated September 28, 1974, Dr. Weiss said:

> "I do not believe that she knew that the checks she had allegedly possessed were stolen as a result of her need to deny the possibility that the men involved would in any way take advantage of her. This passive-dependent personality disorder rendered her incapable of understanding this." (Appellant's Appendix E-3).*

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* A psychiatrist employed by the Government, Dr. Stanley Portnow, concluded that the defendant did not suffer from such a personality disorder and *was* capable of knowing the checks had been stolen (Tr. 6).

In short, the defense offered no testimony to the effect that Catherine Bright suffered from a mental disease or defect which affected her mental responsibility for the acts charged. Indeed, it was for that very reason that Judge Motley excluded the proffered testimony as inadmissible in the absence of an insanity defense under *Freeman*.

It is apparent from the initial argument made by Bright to this Court (Brief at 11-25) that she misconstrues the thrust of the defense which trial defense counsel sought to introduce. Accordingly, it is important that this Court focus on the real issue in this case: whether evidence of a personality disorder which is not indicative of a lack of mental responsibility under *Freeman* is admissible in evidence to show a lack of specific intent or knowledge where that is an element of the offense charged, as it was in this case under Title 18, United States Code, Section 1708. *See Barnes* v. *United States*, 412 U.S. 837, 845 (1973)

In *United States* v. *Freeman, supra,* 357 F.2d at 622, Judge Kaufman enunciated the applicable standard for the determination of mental responsibility in the courts of this Circuit:

> "'A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.'"

Thus in *Freeman* the Court rejected the M'Naghten Rule * and adopted the standard contained in Section 4.01 of the Model Penal Code.

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* *M'Naghten's Case,* 10 Clark & Fin. 200 (1843).

But Bright does not invoke *Freeman* here. She sought at trial to introduce expert psychiatric testimony to show that while she was capable of appreciating the wrongfulness of her conduct and conforming to the requirements of the law, she was nonetheless unable to know that the checks she possessed were stolen, due to her passive-dependent personality and her unconscious disregard for the shortcomings of the men in her life. The defense was aimed only at the issue of specific knowledge. *Cf. United States* v. *Sullivan*, 406 F.2d 180, 186 (2d Cir. 1969).

Bright's argument is without precedent in this Circuit. Accordingly, she looks elsewhere for support and purports to find it in *United States* v. *Brawner*, 471 F.2d 969 (D.C. Cir. 1972), a case which changed the insanity test in the District of Columbia Circuit and adopted The American Law Institute standard already in use in this Circuit after *Freeman*. In addition, although not required by the facts of the case, the Court in *Brawner* adopted a rule which would permit evidence of an abnormal mental condition in premeditated murder cases where the evidence would be insufficient to exonerate the defendant as insane, but rather would negate the specific intent necessary for commission of the crime charged and permit conviction of a lesser offense. *Id.*, at 998-1003.

The Court stated:

> ". . . [E]xpert testimony may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime—even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration." *Id.*, at 998.

Bright seeks to apply the *Brawner* rationale to the facts of this case to obtain admissibility of testimony that due

to her particular personality disorder she could not entertain the knowledge required for commission of the crime charged. We submit that even if *Brawner* may be applied in certain limited circumstances, reliance on that case is wholly misplaced in the instant case.

The initial answer to the defense argument is that the *Brawner* concept is not the law in this Circuit. The courts of this Circuit have always carefully distinguished between evidence which bears on the defense of lack of mental responsibility and evidence which bears on the formation of intent or knowledge. In this regard the defense of lack of specific intent most often arises in prosecutions for tax evasion under Title 26, United States Code, Section 7201, in which the element of "willfuless" must be proved. For example, in *United States* v. *Baird,* 414 F.2d 700 (2d Cir. 1969), *cert. denied,* 396 U.S. 1005 (1970), a tax evasion case, the defendant claimed that under *Freeman* he had not been mentally responsible at the time of the acts charged. Baird *also* asserted that the Government had failed to prove that his actions had been wilful. The Court addressed the question of admissibility of the defendant's out-of-court statements to psychiatrists, and held the statements admissible as forming the basis for the experts' opinions as to mental responsibility, but not admissible on the issue of the defendant's willfulness or state of mind. *Id.,* 414 F.2d at 709, 710.

In *United States* v. *Pawlak,* 352 F. Supp. 794 (S.D.N.Y. 1972), the *Baird* rationale was applied by Judge Tenney to a tax evasion case which presented issues similar to those herein. The defendant's psychiatrist had testified that although the defendant did not lack mental responsibility under the *Freeman* standard, he had not wilfully evaded taxes, apparently due to an "anxiety over money." *Id.,* at 802. The Court ruled:

> "Defendant has also offered the testimony of his psychiatrist, Dr. Ruddick, in support of his claim

> that he could not have acted willfully. The Court, however, has been unable to give much weight to Dr. Ruddick's testimony in light of defendant's decision not to claim insanity as a defense, *United States* v. *Freeman,* 357 F.2d 606, 622-623 (2d Cir. 1966), and the general rule in this Circuit that psychiatric testimony is not admissible solely on the issue of willfulness. *United States* v. *D'Anna,* 450 F.2d 1201, 1204-1205 (2d Cir. 1971); *United States* v. *Baird,* 414 F.2d 700, 703-704 (2d Cir. 1969), *cert. denied,* 396 U.S. 1005, 90 S.Ct. 559, 24 L. Ed. 2d 497 (1970). . . While there is some authority for defendant's offer of psychiatric testimony on the issue of willfulness, *Rhodes* v. *United States,* 282 F.2d 59 (4th Cir.), *cert. denied,* 364 U.S. 912, 81 S.Ct. 275 5 L. Ed. 2d 226 (1960), *see also, United States* v. *Brawner,* 471 F.2d 969 (D.C. Cir. 1972) (*en banc*), the law is otherwise in this circuit and "[b]eing sane, he had the capacity to act willfully." *United States* v. *Haseltine,* 419 F.2d 579, 581 (9th Cir. 1969)." *Id.,* at 801, 802.

In *United States* v. *Haseltine,* 419 F.2d 579 (9th Cir. 1969), the defendant was prosecuted for wilful failure to file tax returns under Title 26, United States Code, Section 7203. He sought to establish that his failure to file was not wilful, but was produced by psychological and emotional pressures which he wished to prove through the testimony of psychiatrist. The Court of Appeals for the Ninth Circuit upheld the District Court's rejection of the defendant's offer of proof:

> "It was not error for the court to reject this offer. Insanity was not interposed as a defense and it is not contended that appellant's compulsion so affected his volitional control as to meet insanity standards. We reject appellant's argument that the doctrine of diminished responsibility should never-

theless relieve him of the consequences of his conduct. Being sane, he had the capacity to act wilfully. The question is whether he did in fact so act." *Id.*, at 581 (footnote omitted).

Likewise, in this case, Catherine Bright was undoubtedly sane and had the capacity to know that the checks she possessed and cashed were stolen.

In another context, this Court has declined the opportunity to apply psychiatric evidence to the issue of specific intent or willfulness. In *United States* v. *Bohle*, 475 F.2d 872 (2d Cir. 1973), the defendant was charged with aircraft piracy in violation of Title 49, United States Code, Section 1472(i), a "specific intent" crime.* Bohle contended that he had been legally insane under the *Freeman* standards, but the Court affirmed the conviction, finding sufficient evidence to warrant the jury's conclusion that he had been sane. In so holding, the Court noted that the Government's expert psychiatric witness had determined that Bohle had a " 'psychopathic personality'—a person-

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* 49 U.S.C. § 1472(i) provides:

(i) Aircraft piracy.

(1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished——

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft within the special aircraft jurisdiction of the United States.

ality disorder—but [had] concluded that he had no mental disease or defect." *Id.,* at 874. The Court held:

> "From all the evidence, reasonable men could infer either that Bohle was schizophrenic and delusionally fleeing from reality, as the defense contended, or that he was merely mentally unstable and rationally fleeing from responsibility, as the prosecution argued." *Id.,* at 874, 875.

Significantly, the Court struck no middle ground. Bohle was to be found either mentally responsible or not, despite the requirement for proof of specific intent. The Court did not consider the evidence of personality disorder as negating the ability to form specific intent, although the facts of the case presented an appropriate opportunity for doing so. Obviously, then, this Court has recognized that the use of psychiatric testimony is to be applied only under the carefully constructed guidelines of the *Freeman* test. Evidence of personality disorders and the like simply is irrelevant on the issue of intent or knowledge absent the assertion of the defense of lack of mental responsibility, which was not involved in this case.

Should the Court determine that the rationale of *United States* v. *Brawner, supra,* is sound, it may not be applied to the facts of this case in any event. As the Court noted in *United States* v. *Haseltine, supra,* evidence of "diminished responsibility", *i.e.,* something less than a total lack of mental responsibility, is limited in admissibility almost exclusively to cases in which the charge of premeditated murder is mitigated to murder in the second degree. *United States* v. *Haseltine, supra,* 419 F.2d at 581, n.3. Indeed, even the Court in *Brawner* seemingly restricted its holding to apply only to such situations. *United States* v. *Brawner, supra,* 471 F.2d at 1000, 1001.* In so doing, the Court

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* All of the cases cited by the Court in *Brawner* as support for the "less than insanity" standard on specific intent are murder

[Footnote continued on following page]

disavowed the fears it had voiced in *Fisher* v. *United States*, 149 F.2d 28, 29 (D.C. Cir. 1945), *aff'd*, 328 U.S. 463 (1946):

> "To give an instruction [that the jury consider the defendant's entire personality on the basis of psychiatric testimony] . . . is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crime."

The Court in *Brawner* recognized that when applied to premeditated murder situations psychiatric evidence short of establishing lack of mental responsibility would not result in the release of the defendant, but rather into his conviction for a lesser offense:

> "That a man's abnormal mental condition may be material as negativing premeditation and deliberation does not set him 'at liberty' but reduces the degree of criminal homicide." 471 F.2d at 1001.

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cases, save two. *United States* v. *Brawner*, 471 F.2d 969, 100, n. 55-66 (D.C. Cir. 1972). Those two cases, *Gallegos* v. *People*, 411 P. 2d 956 (Col. 1966) and *Schwickrath* v. *People*, 411 P. 2d 961 (Col. 1966) involved the statutory crime of felonious escape. The cases are distinguishable because the Court found that the evidence of "diminished responsibility" was specifically made admissible by statute in Colorado.

Moreover, all of the cases cited in Annotation, "Mental or Emotional Condition as Diminishing Responsibility for Crime," 22 A.L.R. 3d 1228 (1968), are murder cases with the exception of a few. Id., at 1255-1257. None of the cases cited therein discuss the issue in terms of its obvious problems, addressed *infra*.

There is one Federal case applying the *Brawner* rationale to a crime other than murder. In *Rhodes* v. *United States*, 282 F.2d 59 (4th Cir.) 364 U.S. 912 (1969), *cert. denied*, the Court approved the admissibility of psychiatric testimony that the defendant was sane, yet mentally incapable of knowing he was perpetrating a fraud in making false applications. *Id.*, at 60. Title 18, United States Code, Section 1014. The Court failed to recognize any of the difficulties inherent in adoption of such a rule in the usual case, and its holding appears not to have been adopted elsewhere.

The Court went on to recognize that new statutes had provided for institutional care for the mentally ill who were not criminally insane, and that those "statutory provisions provide a shield against danger from persons with abnormal mental conditions—a danger which in all likelihood bolstered, or even impelled, the draconic *Fisher* doctrine." *Id.,* at 1001-1002. The Court noted that its opinion only provided for "the admission and consideration of expert testimony on abnormal mental conditions insufficient for complete exoneration. . ." *Id.,* at 1002.

In short, the use of the testimony approved in *Brawner* is limited to homicide cases or in cases where a lesser included "general intent" offense provides an alternative short of exoneration. In other situations, such as the instant case, the *Brawner* rule simply has no application. Indeed, to use the testimony offered in this case would create an unworkable anomaly. Exoneration would result through the use of a rule specifically designed to apply only where the evidence of the abnormal mental condition is *insufficient* to exonerate. The "substantial capacity" standard under *Freeman* would be effectively emasculated if that situation were to prevail, and the Government would be required to establish not only that the defendant was mentally responsible beyond a reasonable doubt, but that the defendant's psychological, emotional or personality problems did not negate specific intent, knowledge or willfulness. This Court clearly did not anticipate such a burden in *Freeman,* and it is apparent from the restrictions built into the *Brawner* opinion that the District of Columbia Circuit did not as well.

Nor is it satisfactory to suggest that because evidence of voluntary intoxication is admissible on the issue of specific intent, evidence of abnormal mental condition is likewise admissible. First, the testimony on intoxication must be such that it proves that the defendant was rendered incap-

able of knowing what he was doing.* *Tucker* v. *United States,* 181 U.S. 164 (1894); *Hopt* v. *People,* 104 U.S. 631 (1881); *Heideman* v. *United States,* 259 F.2d 943 (D.C. Cir., 1958), *cert. denied,* 359 U.S. 959 (1959).** However, the inebriate's absolute incapacity to formulate specific intent may result in exoneration. The "abnormal mental condition" of a defendant may not. The Court expressed the dichotomy in *United States* v. *Brawner, upra,* 471 F.2d at 999:

> "Neither logic nor justice can tolerate a jurisprudence that defines the elements of an offense as requiring a mental state such that one defendant can properly argue that his voluntary drunkenness removed his capacity to form the specific intent but another defendant is inhibited from a submission of his contention that an abnormal mental condition of which he was in no way responsible negated his capacity to form a particular specific intent, *even though the condition did not exonerate him from all criminal responsibility* (emphasis added)."

It is settled that a defendant may well have a mental disorder or deficiency, or any number of personality defects, and still be held responsible for his crime. *See United States* v. *Kohlman,* 491 F.2d 1250, 1252 (5th Cir. 1974); *United States* v. *Bohle, supra.* That is exactly the situation in the case at bar.

Furthermore, even if the *Brawner* rule were applicable in a prosecution under Title 18, United States Code, Section 1708, this is not an appropriate case for such application. Procedurally, *Brawner* suggests that where, as in this case,

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* In this connection one court has suggested convincingly that a man *that* drink *must* be insane. *Fay* v. *State,* 316 P. 2d 924 (Nev. 1957.)

** The extent of the "voluntary intoxication" defense in this Circuit is uncertain. *See United States* v. *Clark,* 498 F.2d 535, 537 (2d Cir. 1974).

the expert testimony is not offered as part of the defense of lack of mental responsibility, an offer of proof is required outside the presence of the jury. *United States* v. *Brawner, supra,* 471 F.2d at 1002. "The judge will then determine whether the testimony is grounded in sufficient scientific support to warrant use in the courtroom, and whether it would aid the jury in reaching a decision on the ultimate issues." *Id.* In the instant case the defense made absolutely no showing of the "sufficient scientific support" contemplated by the Court in *Brawner.* It is important to note here that by using the term "abnormal mental condition", the *Brawner* court intended to permit the admissibility of evidence which was within the definition of "mental disease or defect" which it had earlier announced in *McDonald* v. *United States,* 312 F.2d 847 (D.C. Cir. 1962). *United States* v. *Brawner, supra,* 471 F.2d at 1002 n. 75. In McDonald the Court stated:

> ". . . [T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls." *McDonald* v. *United States, supra,* 312 F.2d at 851.

In this case there is no showing in the letters from Dr. Weiss or in the offer of proof by defense counsel of anything which approaches evidence an abnormal mental condition which would substantially affect mental or emotional processes *and* substantially impair Bright's behavior controls. Rather, Bright here sought to use evidence of a personality disorder, which is merely indicative of her type of personality and not reflective of any abnormal mental condition as defined in *McDonald.**

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* Personality disorders have been described in the following terms, an obvious contrast to the type of mental condition contemplated as pertinent evidence by the *Brawner* court:

[Footnote continued on following page]

The task of integrating expert psychiatric testimony into the trial court is difficult enough on the issue of sanity or mental responsibility. *See* Dix, "Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like," 62 J. Crim. L., C & P.S. 313, 334 (1971). However, to permit consideration of evidence of ill-defined emotional conditions on the issue of formation of specific intent is to inject into the criminal decision process evidence which even the experts find uncertain. As the Court noted in *Curl* v. *State*, 162 N.W. 2d 77, 83 (Wis. 1969):

> ". . . It may well be that all criminal behavior connotes some degree of personality disorganization. It may well be that, far short of actual psychosis, the personality with a paranoid flavoring may have less room to maneuver in forming intent or resisting impulses to engage in criminal or antisocial acts. Much has been written on the role of the emotions in patterns of human behavior and in the causation of crime. However, at best, a courtroom makes an awkward psychiatrist's couch. Judge and jury ought not be required to identify, classify and evaluate all categories and classifications of human behavior beyond the establishing of the fact of sanity. Even acknowl-

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"The personality disorders differ then in the psychopathologic manifestations and do not present themselves in the grossly regressive disturbances of the behavior, affect, or thought of the psychoses or in the exaggerated and fixed psychological defenses that characterize the psychoneurotic."

* * * * *

"They are recognized as forms of personality organization that contain many features similar to those found in patients with the various types of affective and schizophrenic reactions, but in the individuals in whom these disorders are present egofunctioning and reality testing remain intact and allow effective social adaptation." NOYES' MODERN CLINICAL PSYCHIATRY, Lawrence C. Kalb, Ed. (1968), at 501.

> edged experts in behavioral sciences disagree on personality classifications, as well as on their application to individual cases. In the law the dividing line as to accountability or nonaccountability due to mental condition is the test of sanity, whatever the legal definition of these terms may be or come to be. The sane person is held accountable for his actions. The insane person is not. Personality disturbances or emotional disorders that fall short of insanity are not required areas of court inquiry and particularly not in that portion of bifurcated trial on the issue of guilt." [footnote omitted]*

This case presents a perfect example of the difficulties inherent in using evidence of emotional disturbances or personality disorders on the issue of knowledge or specific intent. The proffered evidence speaks only in terms of the defendant's personality type and not an abnormal mental condition as defined in *Brawner*. In fact, although requested to respond in such terms, Dr. Weiss carefully avoided use of the standard suggested by trial defense counsel. (Appellant's Appendix, E-3). Thus, had evidence been received, the issue of knowledge would have been framed for the jury in terms not even recognized by the Court in *Brawner*.

We suggest that the appropriate arena in which to test the effect of personality disorders upon criminal behavior is through the use of legislative study and clinical experience. *See Stewart* v. *United States,* 275 F.2d 617, 623 (D.C. Cir. 1960), *rev'd on other grounds,* 366 U.S. 1 (1961). Bright gives no sound reason why the evidence she sought to use at trial should be admitted on the limited issue of knowledge, and both logic and common sense dictate that tilting at the windmill of personality disorders should be done in the legislative rather than the judicial forum.

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* Wisconsin employs a system by which the jury first determines guilt or innocence and then considers the question of insanity after a guilty verdict.

Finally, it is evident from the record that Bright successfully placed before the jury the very point which she had sought to make through expert testimony; that she had been deceived by the man who had befriended her, that she believed his representations concerning the checks, and that she had not known that the checks were stolen. (Tr. 131, 132). The jury obviously understood her defense because it acquitted her of crimes arising from her possession of checks cashed before she had notice of irregularities and convicted her only of knowing possession of stolen checks which she cashed after an earlier check had been returned by her bank. The proffered psychiatric testimony would not have added anything of relevance in any event.

Accordingly, Judge's Motley's rejection of Dr. Weiss' testimony was correct and well within the Court's discretion. *Salem* v. *United States Lines,* 370 U.S. 31, 35 (1962); *United States* v. *Barnard,* 490 F.2d 907, 912-913 (9th Cir.), *cert. denied,* 416 U.S. 959 (1974).

The District Court's ruling should be affirmed.

POINT II

The District Court's Charge on the Element of Knowledge Was Correct.

Judge Motley instructed the jury on all of the elements of the crime of possession of stolen mail, including the requirement that before it could convict, the jury had to be convinced beyond a reasonable doubt that Bright knew that the checks she had possessed were stolen (Tr. 257-259). The Court also charged the jury on "reckless disregard" for the truth:

> "You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen but with a conscious effort to avoid learning

> the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks." (Tr. 260).

During its deliberations, the jury sent in the following note:

> "Request clarification of term 'reckless disregard' as it pertains to whether the defendant had knowledge of whether checks were stolen.
>
> "Also—can that be stipulated as part of the verdict? (If possible, for this to be answered in the courtroom.)" (Tr. 271).

After consulting with counsel for both sides, the Court responded as follows:

> "Now, in reply to that, I will reread that portion of the charge in which that term was used, and if that does not suffice you can let me know by written note.
>
> "You may also find that the defendant had the requisite knowledge if you find that she acted with reckless disregard as to whether the checks were stolen or were [sic] conscious effort to avoid learning the truth, even though you may find that she was not specifically aware of the facts which would establish the stolen character of the checks.
>
> "Now, with respect to the second part of your note, which reads as follows, 'Also can that be stipulated as part of the verdict?' the answer to that is no. Your verdict must be either guilty or not guilty." (Tr. 277-278).

The defendant argues that the second "reckless disregard" instruction was improper because it equates "reckless disregard of the facts with criminal knowledge." (Br. at 36). Bright bases her argument on the semantic point that the "reckless disregard" language and the "conscious avoid-

ance" language of the instruction should have been expressed in the conjunctive "and" rather than the disjunctive "or." This Court has consistently rejected that argument in upholding the equation about which Bright now complains. *United States* v. *Sarantos,* 455 F.2d 877, 881 (2d Cir. 1972); *United States* v. *Gottlieb,* 493 F.2d 987, 994-995 (2d Cir. 1974); *United States* v. *Brawer,* 482 F.2d 117, 128-129 n. 14 (2d Cir. 1973). *See also United States* v. *Thomas,* 484 F.2d 909, 914 (6th Cir. 1973), *cert. denied,* 415 U.S. 924 (1974).

Thus, it is the law in this Circuit that a jury may find the requisite criminal knowledge from a defendant's reckless disregard for the truth. Judge Motley's instructions on that point were eminently correct.

Bright also argues that the District Court erred by failing to give a defense-requested instruction that if the jury found that the defendant actually believed that the checks were not stolen, she should be acquitted (Br. 37). In support of that argument, Bright claims that,

> "This Court has consistently held that where knowledge of a fact is an essential element of a crime and the defendant entertains an actual belief contrary to fact, no amount of recklessness will permit a criminal conviction" (Brief at 38).

To the contrary, the law in this Circuit simply is that the Government must establish that the defendant *knew* that the mail matter in his possession was stolen property, either by proof of actual knowledge or proof of a conscious avoidance of or reckless disregard for the truth. *United States* v. *Gottlieb, supra; United States* v. *Sarantos, supra. United States* v. *Egenberg,* 441 F.2d 441 (2d Cir.), *cert. denied,* 404 U.S. 994 (1971); *United States* v. *Abrams,* 427 F.2d 86, 91 (2d Cir.), *cert. denied,* 400 U.S. 832 (1970). While a defendant's claimed subjective belief is undoubtedly relevant on the issue of knowledge, that belief even if truly

held, cannot foreclose conviction as a showing of "a conscious purpose to avoid enlightenment" or a "wilfull blindness to the existence of the fact" *Untied States* v. *Brawer, supra,* 482 F.2d at 128, 129 fn. 14. Moreover, the District Court specifically instructed the jurors to consider the defendant's denials and her testimony that she had accepted the explanations of Freddie, the man from whom she had received the checks (Tr. 257). The Court then stated: "If you find that the defendant did not know the checks were stolen, then of course you must acquit the defendant, find the defendant not guilty." (Tr. 258).

The Court's instructions in this regard were obviously a full and correct statement of the law. *United States* v. *Gottlieb; United States* v. *Brawner; United States* v. *Sarantos,* all *supra.* A defendant is not entitled to instructions in the specific language of his own requests. *United States* v. *Rosa,* 493 F.2d 1191, 1195 (2d Cir.), *cert. denied,* 42 U.S.L.W. 3210 (October 15, 1974). *See also United States* v. *Kahn,* 472 F.2d 272, 284-285 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1975— 614—211—474

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. Barry Kingham being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of MARCH, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

J. Truman Bidwell, Esq.
30 Rockefeller Plaza
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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Barry Kingham

Sworn to before me this
3rd day of March, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975